In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

Receivers of Virginia Iron, Coal and Coke Company, et al.,
Petitioners,
v.
William H. Staake, Trustee of C. R. Baird & Company, Bankrupts,
Respondent.

To William H. Staake, Trustee of C. R. Baird & Company, Bankrupts:

You are hereby notified that on Monday, March 27th, A. D. 1905, at the motion hour, we will file a petition and enter a motion before the Supreme Court of the United States at Washington, D. C., to grant a writ of *certiorari* directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Fourth Circuit to require said Court to certify to the Supreme Court of the United States for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein the Receivers of the Virginia Iron, Coal and Coke Company, et al. were petitioners, and William H. Staake, Trustee for, etc., was respondent, being No. 531.

S. HAMILTON GRAVES,
of Counsel for—
Henry K. McHarg, and A. A. Phlegar,
Receivers of Virginia Iron, Coal and Coke Company,
Huff, Andrews & Moyler Company,
Nelson & Myers,
Smith & King,
Fairfax & Bell,
Central Manufacturing Company,
Standard Oil Company.

Notice of the foregoing motion is hereby accepted and other service waived this the 13th day of March, A. D. 1905.

WILLIAM H. STAAKE,
Trustee for, Etc.

By S. & M. GRIFFIN,
of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1904

RECEIVERS OF VIRGINIA IRON, COAL AND COKE COMPANY,

v. Petitioners

WILLIAM H. STAAKE, TRUSTEE OF

C. R. BAIRD & COMPANY, BANKRUPTS, Respondent

Petition for writ of certiorari, to the United States Circuit Court of Appeals for the Fourth Circuit, requiring it to certify to the Supreme Court of the United States, for its review and determination, the case of Receivers of Virginia Iron, Coal and Coke Company, Petitioners, versus William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, Respondent (No. 531), lately pending in said Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Henry K. McHarg and A. A. Phlegar, Receivers of the Virginia Iron, Coal and Coke Company, a corporation; Huff, Andrews & Moyler Company, a corporation; A. M. Nelson and H. H. Myers, partners, trading as Nelson & Myers; Roy B. Smith and A. E. King, partners, trading as Smith & King; R. R. Fairfax and E. Lee Bell, partners, trading as Fairfax & Bell; the Central Manufacturing Company, a corporation; and the Standard Oil Company, a corporation, respectfully show:

I.

1st. That the questions of law involved in this cause are novel, of peculiar gravity and of vital importance in the general

administration of the Bankruptcy Act of 1898 (30 Stat. at L. 565 U. S. Comp. Stat. p. 3450); they arise upon the construction to be placed upon and the effect to be given Sec. 67f of that act, which is as follows:

> "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry."

The questions, as presented, have not heretofore been directly passed upon so far as we can ascertain by any court, save in this cause, and in the abstract are:

(*a*) Is a lien void (in the absence of fraud) under Sec. 67f, *quoad* a bankrupt's trustee which is not to the prejudice of a bankrupt's creditors, and which is not upon and does not affect property belonging to the bankrupt, or property which his general creditors could have subjected as of the date the petition in bankruptcy was filed? In other words: Is an attachment which is in favor of a creditor of a bankrupt and which is a *valid lien* upon the property of a third party, void *quoad* the trustee of the bankrupt?

(*b*) Can the trustee of a bankrupt be subrogated to the rights of a creditor of a bankrupt, in an attachment which is

a lien only upon property, which was no part of the bankrupt's estate when the petition was filed, and which consequently could not pass to the trustee under Sec. 70 of the act?

(*c*) Can the trustee of a bankrupt cause to be declared void the lien of, and be subrogated to the rights of a creditor of the bankrupt, in an attachment which is not a lien upon the bankrupt's estate, but which is a valid lien *quoad* the owner of the attached property, when if such lien be enforced for the sole benefit of the attaching creditor it will work no diminution of the bankrupt's estate?

2nd. The question of what constitutes a *preference* as that term is used in the Bankruptcy Act of 1898, is also involved, and the construction given thereto by the Circuit Court of Appeals of the Fourth Circuit in this cause, is in direct conflict with the construction given thereto by the Circuit Court of Appeals of the Eighth Circuit. That a decision of this question by your Honorable Court is necessary to secure uniformity of decision in the administration of the Bankruptcy Act.

II.

The facts of this cause were agreed upon (R., pp. 13-18 inc.) and the Honorable Judge Morris, who wrote the opinion (R., p. 31) of the Circuit Court of Appeals, gives this summary:

"Chester R. Baird, trading as C. R. Baird & Co., on December 7, 1899, owned certain real estate in Virginia known as the West End Furnace property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing encumbrances, and executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to wit, shares amounting to $500,000 of the capital stock of the said Roanoke Furnace Company.

"Under the contract of sale the Roanoke Furnace Company took immediate possession in December, 1899, of the property so purchased, but no deed to the Company was executed by Baird until November 5, 1900, when a proper deed was executed and

promptly recorded. In the meantime, during the month of October, 1900, nine different attachments, amounting to over $40,000, against Baird as a non-resident of Virginia, were issued at the instance of certain of his creditors (among whom were your petitioners), and were levied upon the Furnace property. Under the provisions of the laws of Virginia, no deed from Baird to the Furnace Company having been executed and recorded until after the attachments were levied, it is conceded that the attaching creditors acquired as against Baird and the Furnace Company a lien upon the property so levied upon (Code of Virginia, 1887, Sections 2463, 2464, 2465, 2472). Within four months of the levying of the attachments, to wit, on December 24th, 1900, an involuntary petition in bankruptcy was filed against Baird in the United States District Court for the Eastern District of Pennsylvania, and he was adjudged a bankrupt, and on January 2, 1901, the District Court of the United States for the Western District of Virginia assumed ancillary jurisdiction of so much of the bankruptcy proceedings as related to the property located in Virginia. On December 29, 1900, also within four months from the levying of the attachments, an involuntary petition in bankruptcy was filed against the Roanoke Furnace Company, and such proceedings were had that it was adjudicated a bankrupt. On March 26, 1901, William H. Staake was appointed trustee of the bankrupt estate of C. R. Baird, and on June 29, 1901, John N. M. Shimer was appointed trustee of the bankrupt estate of the Roanoke Furnace Company.

"Under orders of Court the property which was theretofore conveyed by Baird to the Furnace Company was sold and the rights and claims of all the parties were transferred to the fund derived therefrom, and all these claims were submitted to the determination of the court below by express consent of all the parties."

It further appears from the record in said cause, that the proceeds from the sale, when made by the officers of the Court, of the property conveyed by the deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company, were suffi-

cient to pay off and discharge all liens held by your petitioners.

It further appears from the record (page 3) that the amounts due your petitioners are as follows:

Receivers of Virginia Iron, Coal & Coke Co,	$24,778.83
Huff, Andrews & Moyler Company, . .	934.00
Nelson & Myers, ...	600.91
Smith & King, ...	1,050.00
Castner, Curran & Bullitt, ...	843.00
Fairfax & Bell, ...	640.00
Central Manufacturing Company, . . .	773.21
Standard Oil Company, ...	383.14

That subsequent to the sale of the attached property, and the signing of the agreed statement of facts, a petition was filed in the "In re Roanoke Furnace Company, Bankruptcy proceedings," in the District Court of the United States for the Western District of Virginia by William H. Staake, Trustee for C. R. Baird, wherein it was asked *inter alia*, that the liens acquired by your petitioners upon the property known as the "West End Furnace Property" (which was the property conveyed by deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company), be declared void as to him, and that they be preserved by the Court for his benefit as Trustee of C. R. Baird (R., p. 10). To this petition (R., pp. 19-20) a demurrer and answer was filed by your petitioners.

III.

Upon the hearing of the issues made by said petition, and the demurrer and answer thereto, the District Court overruled the demurrer and in effect decided and held that the attachment liens having been obtained through legal proceedings to which Baird was a party, he being insolvent, and within four months prior to the filing of the petition in Bankruptcy against him, were null and void under Sec. 67f of the Bankruptcy Act of 1898, and though the property attached was not the property of C. R. Baird when the bankrupt petition was filed, that power was given to the court by said section to enforce liens for the benefit of all the creditors, even though said liens might not be annulled under said Sec. 67f (R., p. 24); that if one creditor was paid in full

while other creditors received only a portion of their claims, a preference would be created, though the payment to the creditor who was paid in full was from a source other than the bankrupt's estate; that Sec. 67f is not confined to liens that create a preference, that if the attachment was held to be valid *quoad* Staake, Trustee, it would give a preference to your petitioners; the court then declared the liens void as to said trustee and ordered that they be preserved for the benefit of Baird's estate, and on January 14, 1904 (R., p. 27), ordered as follows: "That the rights acquired by the Attachment proceedings in the Hustings Court of the City of Roanoke by the attaching creditors" (to wit, your petitioners herein,) "be preserved for the benefit of the estate of the said C. R. Baird, Bankrupt, and that said petitioner, William H. Staake, Trustee of the said estate, be and he is hereby subrogated to said rights and authorized and empowered to enforce the attachment liens with like force and effect as the said attaching creditors might have done had not the Bankruptcy proceedings intervened."

IV.

On January 21, 1904, your petitioners filed in the United States Circuit Court of Appeals for the Fourth Circuit their petition, wherein they prayed the jurisdiction of said Court under the provisions of Sec. 24-b of said Bankruptcy Act, and that said Court superintend and revise in matter of law the proceedings and findings of the District Court, and that said Court revise, reverse and annul that portion of the decree of January 14, 1904, as is last above set forth (R., pp. 1-7).

That in said Circuit Court of Appeals said case was docketed as follows: "Receivers of Virginia Iron, Coal and Coke Company, Petitioners, v. William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, Respondent," and was entered as No. 531.

That said case was on May 12 and 13, 1904, argued and submitted in said Court; that on November 15, 1904, the said Circuit Court of Appeals rendered an opinion per Morris, District Judge,

concurred in by Goff, Circuit Judge (R., p. 31), and entered an order confirming the judgment of the District Court in the matter brought up for review; that District Judge Purnell, the other member of the Court sitting in the case, filed a dissenting opinion (R., p. 36). Your petitioners, on December 9, 1904 (R., p. 39), filed a petition in said Circuit Court of Appeals, wherein they prayed that a rehearing be granted to them upon the original record therein and upon the majority opinion rendered November 15, 1904, that the decree entered on that date be annulled, and that in lieu thereof a decree be entered in conformity with the prayer of their original petition. The prayer of the petition to rehear was denied by said Court by an order entered February 7, 1904 (R., p. 51).

That among the propositions of law decided and established by the majority opinion of the Circuit Court of Appeals, and by its affirming the opinion of the District Court, are these:

(1) That by virtue of Sec. 67f of the Bankruptcy Act of 1898, an attachment which was levied by a creditor of a bankrupt and became a valid lien under the laws of the Commonwealth of Virginia upon certain real estate, which could not pass to the Bankrupt's trustee, the ownership of and title to said real estate, both legal and equitable, being in a third party at the time the petition in bankruptcy was filed, is void *quoad* the bankrupt debtor's trustee; though said lien is admitted to be valid *quoad* the owner of the property attached.

The attached real estate having been sold to such third party by the bankrupt twelve months prior to the filing of the petition in bankruptcy, for a fair consideration, the entire purchase price paid without diminution because of said attachment, and a deed admittedly valid, executed, delivered and recorded forty-nine days prior to the filing of the petition in bankruptcy.

(2) That the trustee of a bankrupt, under and by virtue of Sec. 67f, shoud be subrogated to the rights of an attaching creditor in an attachment, *which is a lien upon the property of a third party;* property in which the bankrupt had neither ownership nor title, either legal or equitable, property which the bankrupt could not

have transferred, and which could not have been levied upon under judicial process against him within forty-nine days next prior to the filing of the petition in bankruptcy. In other words, that under said section, the trustee of a bankrupt is made the beneficial owner of a lien, which is upon property which could not pass to him as such trustee under Section 70 of the Bankruptcy Act. That such ownership is vested in him by virtue of the fact that the lien was procured by a creditor of the bankrupt, and not because the lien has any effect whatsoever upon the estate of the bankrupt.

(3) That under and by virtue of Section 67f, a trustee of a bankrupt should be subrogated to the rights of a creditor of the bankrupt, in an attachment which is not a lien upon the bankrupt's estate, and should enforce such lien for the benefit of all the creditors, when without such subrogation the lien would not be annulled or the property affected discharged therefrom under Sec. 67f. In other words, that the trustee should be subrogated to the rights of a creditor in an attachment, the lien of which is valid.

(4) That a preference within the meaning of the act is secured, if one creditor receives the full amount of his debt and another does not, even though the creditor who receives payment in full receives nothing from the estate of the bankrupt, but is paid entirely out of property which did not belong to the bankrupt, and which could not be subjected by or pass to his trustee. In other words, that unless each creditor receives equal percentage of payment, regardless of the source from which payment is secured, there is a preference.

A certified copy of the entire record of said case in the Circuit Court of Appeals is hereto annexed as a part of this application, in conformity with Rule 37 of this Honorable Court.

V.

Your petitioners most respectfully represent that the construction given Sec. 67f by said Circuit Court of Appeals of the Fourth Circuit is erroneous. Its effect is to extend the operation

of the Bankruptcy Act beyond the limits fixed by your Honorable Court, and to nullify a principle of law which heretofore has been recognized by the bench and bar of this country as irrevocably established, to wit: That the Bankruptcy Act of 1898 deals only with the estate of the bankrupt (omitting the subject of discharge); that the prohibitions, restrictions and remedies therein provided for, have reference solely and exclusively to the property of the bankrupt which passes, or should pass to his trustee, and that rights become vested as of the date the petition is filed.

In the case of Hewitt v. Berlin Machine Works (194 U. S. 302, 48 Law Ed., p. 988), the court adopted and approved the language of the C. C. A. of the Second Circuit, and said:

> "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors, shall remain undisturbed."

In the case of Pierie v. Chicago Title and Trust Co. (182 U. S., 449: 45 Law. Ed. 1178), the Court used this language:

> "It is hardly necessary to assert that the object of a Bankruptcy Act, so far as creditors are concerned, is to secure equality of distribution among them of *the property of the Bankrupt.*"

Mr. Justice Catron, in the case re Klein, which is cited and approved in Hanover National Bank v. Moyses (186 U. S., 185: 46 Law Ed., 1118), in discussing the constitutional provision for a national bankrupt act, said:

> "Of this subject (bankruptcy) Congress has general jurisdiction; and the true inquiry is: *To what limits is that jurisdiction restricted?* I hold it extends to all cases where the law causes to be distributed *the property* of the debtor among his creditors. This is its least limit."

Mr. Chief Justice Waite, in the case in re. Deckert, which case was cited and approved in Hanover National Bank v.

Moyses, supra, when discussing the constitutional requirement of uniformity of the bankrupt act, used this language:

> "But it has thus far been sustained for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. * * * * One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. *It is quite proper, therefore, to confine its operation to such property as other legal process could reach.*"

That the property attached in the case at bar was not estate of the bankrupt which could pass to his trustee or which could have been reached by process 49 days next prior to the date the petition was filed against him is admitted. That the attachments, if enforced for the petitioners' benefit, will not be paid out of the estate of the bankrupt, Baird, or out of funds derived from a sale of his estate, is not questioned: yet, under these facts the Circuit Court of Appeals has held that the payment of petitioners' attachments to them would create a preference within the meaning of the act (R., p. 34).

In effect that a preference would be created unless an equal percentage of payment was made to each creditor of the bankrupt, regardless of the source from which the fund might be derived with which such payment might be made. Such a construction of a preference is not only erroneous, but is in direct conflict with the construction given by the Circuit Court of Appeals of the Eighth Circuit in the case of Swartz v. Fourth National Bank (117 Federal Rep., page 1). In that case, at page 7, the Court said:

> "The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend *out of the estate of the bankrupt than that estate will pay on other claims of the same class.* It is its effect upon the *equal distribution of the estate of the bankrupt,*

not its effect upon the creditor, that determines the preference.

"Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. *Their relations to third parties, their right to collect of others,* the personal security they may have, their endorsements or guaranties, receive no consideration, no thought. *It is the relations of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt,* and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preference."

Your petitioners further represent, that in addition to the general importance of the propositions of law involved as presented by this petition, the decision is in conflict with those of the courts of last resort of Massachusetts, North Dakota, Kansas and Georgia; those courts having held, that the liens prohibited by § 67f are those upon property which passes to the trustee; (see brief p. 17) and that upon the question of "What constitutes a preference?" it is essential for the uniform construction and administration of the Bankruptcy Act in the Fourth and Eighth Circuits that the conflicting opinions should be harmonized and that this court of last resort should decide and determine which rule of construction should be adopted.

VI.

Your petitioners respectfully represent to this Honorable Court that no appeal is allowed them to this Court and that their only remedy is by petition for writ of certiorari under Section 25d of the Bankruptcy Act of 1898 (C. 541, § 25, 30 Stat. 553—U. S. Comp. Stat., p. 3432).

Wherefore, your petitioners respectfully pray, that the writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and

complete transcript of the record in all proceedings of the said Circuit Court of Appeals of the said case, entitled, "Receivers of Virginia Iron, Coal and Coke Company, Petitioners, v. William H. Staake, Trustee of C. R. Baird & Co., Bankrupts, Respondent No. 531," to the end that the said cause may be reviewed and determined by this Court as provided by law; and that the judgment of the said Circuit Court of Appeals in said case be revised, reversed and annulled, and that this Honorable Court enter and cause to be entered such orders as may be necessary to secure to petitioners the full benefit of their attachment liens hereinbefore referred to, and to which they are clearly entitled. And may your petitioners have such other or further relief and remedy in the premises as to this Court may seem appropriate; and your petitioners will in duty bound ever pray.

S. HAMILTON GRAVES,
Counsel for Petitioners.

WM. G. ROBERTSON,
E. W. ROBERTSON,
ABRAM P. STAPLES,
of Counsel.

State of Virginia, }
City of Roanoke, } To wit:

S. Hamilton Graves, being duly sworn, says that he is of Counsel for the petitioners named; that he has read the foregoing petition, and the facts therein stated are true, as he believes.

S. HAMILTON GRAVES.

Subscribed and sworn to before me, this 16th day of March, A. D. 1905.

My commission as Notary Public expires on April 6th, A. D. 1907.

CHAS. I. LUNSFORD,

SEAL Notary Public for City of Roanoke, State of Virginia.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

Receivers of Virginia Iron, Coal and Coke Company, et al., Petitioners.

v.

William H. Staake, Trustee of C. R. Baird, Respondent.

Brief for Petitioners on Application for Writ of Certiorari.

As the petition for a writ of certiorari contains a concise statement of the most pertinent facts, it is not deemed necessary to give here more than a brief abstract.

In December, 1899, C. R. Baird was the owner of various properties located in Roanoke, Va., one of which was designated as the "West End Furnace Property."

That on December 7, 1899, he sold said last named property to the Roanoke Furnace Company, a corporation.

That he received the entire purchase price to which he was entitled.

That the Roanoke Furnace Company failed to immediately record, as required by the registry laws of Virginia, the written evidence of its purchase.

That in October, 1900, petitioners attached said "West End Furnace Property" for the several debts due to them by C. R. Baird.

That on November 7, 1900, the Roanoke Furnace Company

recorded a deed from C. R. Baird, which conveyed said property to it in fee.

That on December 24, 1900, a petition in bankruptcy was filed against C. R. Baird.

That William H. Staake was subsequently appointed the trustee for Baird's estate.

That on December 29, 1900, a petition in bankruptcy was filed against the Roanoke Furnace Company.

That in the "In re. Roanoke Furnace Company bankruptcy proceedings," Staake, the trustee of Baird, filed a petition and prayed to be subrogated to the rights of the petitioners in their attachments against the "West End Furnace Property."

It will not be contended that the "West End Furnace Property" could or should pass to Baird's trustee.

It will not be denied that all title, interest, and equity in said property did pass to the trustee of the Roanoke Furnace Company, subject to the attachment lien.

It is submitted that the proposition established in this case, That a lien which is upon property which can not pass to the trustee of the bankrupt is void, under Sec. 67f of the Bankruptcy Act, quoad such trustee, is a novel one, and is of such general importance that this Court should grant the writ prayed for, and determine this question. The Court, in its opinion (R., p. 33), in discussing said section, used this language:

> "It is contended however, that as the first clause of this section makes null and void the liens therein mentioned, and declares that the property affected by the lien shall be wholly discharged and released therefrom and pass to the trustee as part of the estate of the bankrupt, therefore the exception in the latter clause of 67f can have reference only to liens on property, which, if the liens were annulled would pass to the trustee of the bankrupt released from the lien.
>
> "We think this is narrowing the most obvious meaning of the words. The wording seems clearly to contemplate *that a creditor might obtain by reason of his being a creditor of the bankrupt a prohibited lien against property, which would not, if unaffected, pass to the trustee in bankruptcy*, and it would appear

that it was for that reason the clause in question was inserted preserving the lien if the court should so order for the benefit of the estate and vesting it in the trustee."

The proposition involved in the above quotation, to wit, that a creditor, by reason of his being such, may secure a prohibited lien against property which would not, if unaffected, pass to the trustee in bankruptcy, is a pioneer. It imposes a penalty upon a creditor of the bankrupt, by reason of the fact that he is such creditor, and not by reason of any effect which his procuring of a lien upon the property of a third party may have had upon the estate of the bankrupt. It brings into the estate as an asset the proceeds from a lien, not upon that estate but upon property which no process from any court, state or federal, could have reached at the instance of the bankrupt or his creditors, as of the date the petition was filed. It, in effect and in fact, in the case at bar, creates an asset. After a most careful search, we have been unable to find any decision of any court, holding that the Bankrupt Act avoided a lien on any property whatsoever other than that of the bankrupt which passed to his trustee. It has not heretofore been contended that a bankrupt court could take jurisdiction of a creditor of a bankrupt, for the sole reason that he was such. The jurisdiction of the bankrupt court, aside from the question of discharge, has heretofore been confined to the administration of the bankrupt's estate which passed to the trustee. So far as we know, this is the first case in which it has been held that the liens prohibited by Sec. 67f were other than those upon property which passed to the trustee of the bankrupt. The contrary has been held by the courts of last resort in Massachusetts, North Dakota, Georgia, and Kansas.

In Powers Dry Goods Co. v. Nelson (10 N. D., 580), the Court said:

> "Section 67f after declaring that all attachments levied within four months prior to the filing of the petition shall be null and void, and discharged and released, declares that the effect of such a discharge shall be to pass the property covered by the lien "*to the trustee as a part of the estate of the bankrupt.*" It is entirely plain that this section does not refer to

liens upon property which the court does not undertake to administer and over which it has no jurisdiction. * * * If defendant's contention that the discharge in bankruptcy destroyed the lien created by the attachment upon his exempt property, is true, then such exempt property would, under the section above referred to, pass to the trustee as a part of the estate of the bankrupt for the benefit of his creditors; * * * no such absurd construction can be sustained."

In Frazee v. Nelson (61 N. E., R., p. 40) the Supreme Judicial Court of Massachusetts held:

"The effect of Section 67f of the U. S. Bankruptcy Act of July 1, 1898, is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy, and those claiming under him, *so that the property may pass to and be distributed by him among the creditors of the bankrupt.*"

In McKenny v. Cheney (Vol. 11, A. B. R., p. 54) the Supreme Court of Georgia cites with approval the construction given Sec. 67f by the Supreme Courts of Massachusetts and North Dakota. And also cites with approval, the case of Robertson v. Wilson (15 Kansas, 595). And says:

"In the Kansas case the Court said:
'As the bankrupt court gets no jurisdiction of the exempt property, it would seem that it should take none over any specific liens upon such property.' The lien in that case was that of an attachment levied within four months prior to the adjudication in bankruptcy. It was held that, as the homestead did not pass to the assignee in bankruptcy, the bankruptcy proceedings did not dissolve the attachment."

The object of the Bankruptcy Act, the fundamental principle upon which it is founded so far as creditors are concerned (other than the subject of discharge), is to take possession of, through the medium of a trustee, *the property* of the insolvent debtor, convert same into money and distribute it among the general creditors without preference. For that purpose, and that alone, the Bankruptcy Act declares void certain liens ac-

quired within a specified time upon the property of the bankrupt,

Mayer v. Hellman, 91 U. S. 503, 23 L. ed., 377.
Yeatman v. New Orleans Savings Inst., 95 U. S. 764, 24 L. ed., 589.
Stewart v. Platt, 101 U. S., 731, 25 L. ed., 816.
Conner v. Long, 104, U. S., 244, 26 L. ed., 725.

It is submitted that the present Bankruptcy Act must be construed with reference to the purposes which it was enacted to accomplish. The object of the law is to destroy all preference and therefore it destroys liens acquired within the prohibited period, and distributes the assets which belong to the bankrupt, or which his general creditors may subject. But as to any assets which can not pass to the trustee, the general creditors have no interest therein, and an attachment which is a lien upon property which can not pass to the trustee does not operate either to prefer the attaching creditor or to defer the general creditor, and consequently is unaffected by the act. That Section 67f operates to annul an attachment in so far as the same may be a lien upon property which passes to the bankrupt's trustee under Sec. 70 of the act, is not questioned.

That said section operates to annul an attachment in so far as the same may have been levied upon property which could not pass to the bankrupt's trustee, is wholly inconsistent with the object and purpose of the act, that is, the distribution of the bankrupt's property without preference. By the very terms of the section, the lien, to be void, must be upon property which passes to the bankrupt's trustee. The language of the section is specific that the property "*Shall pass to the trustee as a part of the estate of the bankrupt*, unless, etc." The section annuls and revives certain liens on the bankrupt's property; it declares that certain liens against the bankrupt shall be made null and void, and then places thereon this qualification: "Unless the Court shall on due notice order that the right under such levy, judgment, attachment, or other lien, shall be preserved for the benefit of the estate."

The power given to the Court, of preserving such liens, is co-extensive with the destructive operation of the statute.

Only a lien which is made void by clause "F" can be preserved by the Court under clause "F." If the lien be not destroyed by operation of the statute, then there is no power given the Court to preserve it.

The rights of the trustee in bankruptcy have a composite character. He holds *the estate* of the bankrupt, and the *rights* of the bankrupt's creditors to and in that estate in trust, to apply the one for the purpose of the equalization of the other; he owns what the bankrupt owned at the date of the filing of the petition, and no more; he can do what the general creditors could do at the date of the filing of the petition, and no more. It must necessarily follow that when Section 67f annulled certain liens and provided that "The property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, *and shall pass to the trustee as a part of the estate of the bankrupt*, * * * " it had reference solely to property which could pass to the trustee under other provisions of the act.

Upon the question of what constitutes "a preference" as the term "preference" is used in the Bankruptcy Act, the opinion of the Circuit Court of Appeals of the Fourth Circuit is in direct conflict with the opinion of the Circuit Court of Appeals of the Eighth Circuit. The Court of Appeals of the Fourth Circuit (R., p. 34) said:

> "A primary object of the bankrupt law is to prevent preferences, and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors, does produce equality, and prevents preferences."

That the property attached in the case at bar was not estate of the bankrupt, Baird, which could pass to his trustee, is not questioned. Under the laws of Virginia, the property attached at the time the attachment was levied, was the property of Baird, quoad the attaching creditor, because of the failure of the Roanoke Furnace Company to record the contract evidencing

its purchase. Forty-nine days prior to the filing of the petition, to wit, on November 7, 1900, the deed was recorded, and, as of that date, every vestige of interest, legal or equitable, passed from Baird, and subsequent to that date neither he nor anyone claiming under him, either had or could acquire any interest therein or lien thereon, because of his previous ownership. Baird had received the entire purchase price, and the attached property passed to the Roanoke Furnace Company, subject to the attachment liens, which are admitted to be valid quoad it.

It is submitted, that under the law and the facts of this case, a preference, if petitioners' attachments were not sequestered, but were left to them, would not be created, unless the court construed the word "preference," as used in the act, to mean *equal percentage of payment to each creditor, regardless of the fact that such payment would not be made out of the estate of the bankrupt.* Such a construction of a preference is in direct conflict with the construction given by the Circuit Court of Appeals of the Eighth Circuit, in the case of Swartz v. Fourth National Bank, 117 Federal Rep., page 1. In that case, at page 7, the Court said:

> "The test of a preference, as we have seen, is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend *out of the estate of the bankrupt than that estate will pay on other claims of the same class.* It is its effect *upon the equal distribution of the estate of the bankrupt*, not its effect upon the creditors, that determines the preference. * * *
>
> "Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. *Their relations to third parties, their right to collect of others*, the personal security they may have, their endorsements or guaranties, receive no consideration, no thought. It is *the relation of their claims to the estate of the bankrupt, the percentages their claims are entitled to draw out of the estate of the bankrupt*, and these alone, that dictate the relations of the creditors to the estate, and fix their classification and their preferences."

The decision of the Circuit Court of Appeals in this case becomes the law of this circuit, upon both the questions submitted, that is: (*a*) that a lien is prohibited by Sec. 67f, and that a trustee in bankruptcy should be subrogated to the rights of an attaching creditor in an attachment which is a lien upon property which can not pass to him as such trustee; (*b*) and, upon the question of "what constitutes a preference."

It is therefore respectfully urged that this Honorable Court should grant the writ of certiorari as prayed for in the petition, and on the following grounds:

(1) That the decision of the Circuit Court of Appeals of the Fourth Circuit in this case is in conflict with the decisions of the courts of last resort of Massachusetts, North Dakota, Georgia and Kansas, as hereinbefore shown; and also in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit, and the questions involved should be passed upon by this Honorable Court in order to secure uniformity of decision.

(2) That the decision of said Court is subversive of the principle established by decisions of this Honorable Court, to wit, that the Bankruptcy Act of 1898 deals only with the estate of the bankrupt (omitting the subject of discharge); that the prohibitions, restrictions and remedies therein provided for have reference solely and exclusively to the property of the bankrupt which passed, or should pass, to his trustee, and that rights become vested as of the date the petition was filed.

Hewitt v. Berlin Machine Works, 194 U. S. 302, 48 L. ed., page 988.
Pierie v. Chicago Title and Trust Co., 182 U. S., 449, 45 L. ed., page 1178.
Hanover National Bank v. Moyses, 186 U. S. 185, 46 L. ed., page 1118.

(3) That the decision of said Circuit Court of Appeals, that a lien is prohibited by Sec. 67f, and that a trustee in bankruptcy under said section should be subrogated to the rights of an attaching creditor in an attachment levied on property which was not the property of the bankrupt when the petition was filed, and which could not otherwise pass to his trustee, involves

a question of general importance, and especially in those States having registry laws.

It is asked that the writ prayed for be granted.

Respectfully submitted,

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